Message Text

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FM SECSTATE WASHDC
TO AMEMBASSY PORT AU PRINCE

C O N F I D E N T I A L STATE 031095

E.O. 11652: GDS

TAGS: EFIN, EIND, HA

SUBJECT: DUPONT CARIBBEAN

REF: A. PORT AU PRINCE 162
.. B. STATE 002286

1. WE ARE MILDLY ENCOURAGED BY GOH RESPONSE TO DEMARCHE, AND BELIEVE IT USEFUL TO CONTINUE TO EMPHASIZE TO GOH IMPORTANCE OF ACHIEVING PROMPT RESOLUTION OF DCI MATTER.

2. CONCERNING QUESTIONS RAISED PARA 3 OF REFTEL, SECTION 502(B)(4) OF THE TRADE ACT OF 1974 PROVIDES THAT A COUNTRY MAY NOT BE DESIGNATED A GSP BENEFICIARY IF SUCH COUNTRY, INTER ALIA, "HAS TAKEN STEPS TO REPUDIATE OR NULLIFY AN EXISTING CONTRACT OR AGREEMENT WITH A U.S. CITIZEN OR A CORPORATION, PARTNERSHIP, OR ASSOCIATION WHICH IS 50 PER-CENT OR MORE BENEFICIALLY OWNED BY U.S. CITIZENS, THE EFFECT OF WHICH IS TO NATIONALIZE, EXPROPRIATE, OR OTHER-WISE SEIZE OWNERSHIP OR CONTROL OF PROPERTY SO OWNED."
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THUS, U.S. CONSIDERS THAT CANCELLATION OF CONTRACT RIGHTS

MAY CONSTITUTE AN EXPROPRIATORY ACT, DEPENDING ON THE FACTS
AND CIRCUMSTANCES INVOLVED. AS POINTED OUT IN REF B WE
ARE NOT TAKING A POSITION AS TO WHETHER CANCELLATION
OF DCI CONTRACT CONSTITUTED AN ACT OF EXPROPRIATION (I.E.,

WE ARE NOT AGREEING OR DISAGREEING WITH GOH POSITION THAT
CONTRACT WAS VALIDLY CANCELED, OR WITH OPPOSITE VIEW
HELD BY DCI). WE ARE ATTEMPTING TO FINESSE THE ISSUE AT
THIS POINT BY FOCUSING THE PARTIES ON THE QUESTION OF
COMPENSATION (RATHER THAN ON THE VALIDITY OF THE CANCEL-
LATION ITSELF), SINCE IT CAN BE ARGUED THAT COMPENSATION
IS AN OPEN ISSUE UNDER EITHER GOH OR DCI VIEW. (SEE
TALKING POINTS BELOW.) WE RECOGNIZE THAT QUESTION OF
WHETHER CONTRACT WAS PROPERLY CANCELED WOULD PROBABLY BE
RELEVANT TO A DETERMINATION OF AMOUNT OF COMPENSATION DUE
EACH OF THE PARTIES (I.E., WHETHER COMPENSATION TO DCI
FOR LOSS OF CONTRACT RIGHTS WOULD BE INCLUDED IN TOTAL
FIGURE). THUS ISSUE WOULD PROBABLY BE INVOLVED, EITHER
IMPLICITLY OR EXPLICITLY IN ARBITRATION PROCEEDINGS.
AT THIS POINT, HOWEVER, WE BELIEVE IT WOULD BE COUNTER-
PRODUCTIVE TO DISCUSS THIS ASPECT WITH GOH. RATHER, WE
WOULD HOPE FIRST TO SECURE AGREEMENT OF BOTH PARTIES IN
PRINCIPLE TO SUBMIT THE COMPENSATION ISSUE TO ARBITRATION,
AND THEN TO BRING THE PARTIES TOGETHER TO DEVELOP A FRAME
OF REFERENCE FOR THE ARBITRATION. IF DIFFICULTIES ARISE
OVER THE FRAME OF REFERENCE, WE COULD CONSIDER OFFERING
FURTHER ASSISTANCE AT THAT TIME.

3. THUS, OUR POINT IN DISTINGUISHING BETWEEN THE COM-
PENSATION ISSUE AND THE ISSUE OF THE CANCELLATION OF THE
CONTRACT WAS NOT TO IMPLY THAT WE CONSIDER CONTRACT TO
HAVE BEEN PROPERLY CANCELED FOR NON-PERFORMANCE. RATHER,
WHILE RESERVING OUR OWN JUDGMENT ON THE CANCELLATION
ISSUE, WE ARE ATTEMPTING TO SUGGEST TO GOH A RATIONALE
THAT IT COULD USE TO JUSTIFY FURTHER ATTEMPTS AT SETTLE-
MENT WITHOUT COMPROMISING ITS POSITION THAT JUDGMENT
OF THE HAITIAN COURTS IS FINAL AND CANNOT BE REOPENED
(I.E., THAT EVEN IF CONTRACT WAS VALIDLY CANCELED, COM-
PENSATION MAY BE APPROPRIATE, AND COURT DID NOT ADDRESS
THAT QUESTION).
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4. IN VIEW OF FOREGOING, RECOMMEND YOU RESPOND TO FOREIGN
MINISTER'S INQUIRIES ALONG FOLLOWING LINES:

(A) USG CONSIDERS THAT, DEPENDING ON THE FACTS A;D
CIRCUMSTANCES 1NVOLVED, CANCELLATION OF A CONTRACT MAY
CONSTITUTE AN EXPROPRIATORY ACT. SECTION 502(B)(4) OF
THE TRADE ACT OF 1974 SPECIFICALLY REFERS TO CONTRACT

CANCELLATION AS ONE POSSIBLE FORM OF EXPROPRIATION.

(B) WHETHER CONTRACT WAS PROPERLY CANCELED (AN ISSUE ON WHICH GOH AND DCI HAVE DIVERGENT VIEWS) IS NOT NECESSARILY DETERMINATIVE OF COMPENSATION QUESTION. WE CAN CONCEIVE OF SITUATIONS WHERE PARTIES TO A PROPERLY CANCELED

CONTRACT WOULD HAVE RIGHTS TO COMPENSATION (E.G., TO AVOID UNJUST ENRICHMENT OF EITHER PARTY). THUS, IT WOULD SEEM TO US THAT GOH AGREEMENT TO ARBITRATE MATTER OF COMPENSATION NEED NOT BE VIEWED PUBLICLY AS BEING INCONSISTENT WITH GOH LEGAL POSITION.

(C) IN THIS REGARD, GOH WOULD, OF COURSE, BE FREE TO RAISE COUNTERCLAIMS IN SUCH ARBITRATION PROCEEDINGS JUST AS DCI COULD RAISE ANY CLAIMS IT SEES FIT. IT WOULD BE FOR THE ARBITRAL PANEL TO DECIDE WHICH CLAIMS WERE LIGITIMATE AND COMPENSABLE, TAKING INTO ACCOUNT THE TERMS OF THE CONTRACT, HAITIAN LAW, AND INTERNATIONAL LAW.

5. WITH RESPECT TO YOUR QUESTION AS TO THE PAST PRACTICE OF ICSID ARBITRATORS, ONLY A FEW CASES HAVE BEEN SUBMITTED TO THE ORGANIZATION SINCE ITS ESTABLISHMENT, AND NONE HAVE YET REACHED FINAL DECISION. THUS, THERE IS NO PATTERN OF PRACTICE WHICH WE COULD DRAW UPON IN DISCUSSING THIS PARTICULAR ORGANIZATION WITH THE GOH. WE NOTE, HOWEVER, THAT ICSID WAS ESTABLISHED UNDER AEGIS OF THE WORLD BANK AND THAT NEARLY 70 STATES HAVE RATIFIED THE CONVENTION. PAINS WERE TAKEN IN THE ESTABLISHMENT OF ICSID TO CREATE AN ARBITRAL PROCEDURE WHICH WOULD BE FAIR AND IMPARTIAL TO ALL PARTIES CONCERNED AND WHICH WOULD PROVIDE DECISIONS BASED ON CAREFUL AND REASONED ANALYSIS RATHER THAN POLITICS OR IDEOLOGY. MOREOVER, THE CHAR-
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ACTED OF THE ARBITRAL PANEL IN A PARTICULAR CASE IS LARGELY DETERMINED BY THE PARTIES THEMSELVES UNDER THE ICSID PROCEDURE (EACH PARTY SELECTS ONE MEMBER OF THREE MEMBER ARBITRAL PANEL, THIRD MEMBER CHOSEN BY MUTUAL AGREEMENT OR BY ICSID). THUS, THERE IS NO REASON TO BELIEVE THAT ANY BIAS IN FAVOR OF COMPANIES OR GOVERNMENTS EXISTS, NOR THAT THE PROCEDURE WOULD RESULT IN A DECISION BASED ON OTHER THAN THE MERITS OF THE CASE. IN THIS CONNECTION, IT SHOULD BE NOTED THAT WE ARE NOT SUGGESTING ANY PARTICULAR ARBITRAL PROCEDURE OR MECHANISM TO GOH. THERE ARE ESTA0LISHED MECHANISMS OTHER THAN ICSID WHICH THE PARTIES MIGHT CONSIDER SHOULD EITHER FIND ICSID UNDESIRABLE FOR ANY REASON, AND THE POSSIBILITY OF THE PARTIES AGREEING ON AN AD HOC PROCEDURE FOR THIS CASE SHOULD NOT BE RULED OUT. INGERSOLL

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